IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 20TH JUNE 2007 / 30TH JYAISHTA 1929

FAO.No. 102 of 2007()

AS.117/2001 of ADDL.SUB COURT, ALAPPUZHA
OS.855/1996 of PRINCIPAL MUNSIFF,ALAPPUZHA

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APPELLANTS/RESPONDENTS/DEFENDANTS:

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1. P. SIDHARDHAN, S/O.PADMANABHAN,
   RESIDING AT NAGENDRAM PARAMBIL,
   PAZHAVEEDU WARD, THIRUVAMPADY MURI,
   ALAPPUZHA.

2. BHARGAVI, W/O.PADMANABHAN,
   RESIDING IN DO. DO.

3. P. RADHAKRISHNAN, S/O.PADMANABHAN,
   DO. DO.

4. BHARGAVI VIJAYAMMA OF DO. DO.

BY ADV. SRI.V.GIRI
SRIR.AZAD BABU

RESPONDENTS: PLAINTIFF:

C. SAROJAM, D/O.CHEMPAKUTTY,
RESIDING IN KURICKASSERIL IN PARAVOOR MURI,
PUNNAPRA VILLAGE, FROM SWAPNAVIHAR,
PARIPALLY MURI, KALLUVATHUKAL VILLAGE.

BY ADV. SRI.P.N.RAMAKRISHNAN NAIR

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR ADMISSION ON 20/06/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.PADMANABHAN NAIR, J.

F.A.O.No. 102 of 2007

Dated this the 20th June, 2007.

J U D G M E N T

This First Appeal from Order is filed against the judgment in A.S.No.117/2001, passed by the lower appellate court, setting aside the judgment and decree passed by the Trial Court, Alappuzha, in O.S.No.855/1996, and remanding the case for fresh disposal with certain directions.

2. The respondent-plaintiff-filed the suit for injunction. She claimed title over the property under a delivery kychit, in execution of the decree passed in O.S.No.937/1987. According to her, she obtained the possession of the property through Court on 30.10.1995. A Commissioner was deputed for conducting local inspection. He filed Ext.C1 report and Ext.C1(a) plan. The Trial Court discarded the commission report and plan, and took a view that the Survey number mentioned in the documents does not tally with the survey number noted by the Commissioner in Ext.C1 report and Ext.C1 (a) plan, and dismissed the suit. The plaintiff filed an appeal before the

lower appellant court as A.S.No.117/2001. The lower appellate court also found that the report and plan submitted by the Commissioner was useless. Before the lower appellate court, plaintiff, the respondent herein, produced certain documents, which was admitted by the court, and marked as Exts.A3 to A5. After considering the evidence, the lower appellate court, set aside the judgment and decree passed by the Trial Court, and remanded the matter, with the following directions:-

> "(1) To try the case de novo;
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> (2) To allow both parties to adduce evidence to substantiate their respective case;
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> (3) To try this case jointly with O.S.172/04, treating O.S.172/04 as the leading case;
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> (4) To appoint a Commissioner assisted by the surveyor to identify the plaint schedule property as per the documents of title produced by both parties and on the basis of the Ext.A1 delivery kychit, if not already appointed in O.S.No.172/04."

Challenging that judgment, this appeal is filed.

3. The Trial Court, as well as the Lower Appellate Court, considering the issue, found that the suit cannot be decided with the help of report and plan submitted by the Commissioner. According to the plaintiff-respondent, she obtained the property through Court in execution of the decree passed in a suit. The Lower Appellate Court also took note of the fact that there is confusion regarding the identity of the property, which the respondents claim title. The Lower Appellate Court was of the opinion that the present suit and O.S.No.172/2004 are to be tried jointly, and hence, remanded the case to the Trial Court.

4. Of course, the direction for a de novo trial cannot be sustained. The court below ought to have permitted the parties to adduce further evidence, if so advised. The direction to try O.S.No.172/2004 along with this case is set aside. It is for the parties to move the Trial Court for a consolidation, if so advised, because, before ordering joint trial, it is necessary to consider the issues arising for both sides. If the Trial Court finds that the consolidation is necessary, it shall pass appropriate orders. The direction to appoint a

Commissioner is also set aside, and it is open to the parties to file petition to appoint a Commissioner, and if such a petition is filed, the Trial Court shall pass appropriate orders, in accordance with law.

5. In the result, I vacate the directions 1, 3, and 4 in the remand order passed by the lower appellate court in A.S.No.117/2001 and make it an open remand, for fresh disposal, in accordance with law.

F.A.O. is disposed of with the above direction.

K.PADMANABHAN NAIR,
JUDGE

nj.